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No. 07-1504

IN THE
Supreme Court of the United States

SCOT HOLLONBECK, *et al.*,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit correctly held that the United States Olympic Committee does not violate the Rehabilitation Act by funding different programs differently, so long as access to each individual program remains facially neutral and non-discriminatory.

RULE 29.6 STATEMENT

Respondent the United States Olympic Committee (USOC) states that it is a nonprofit corporation chartered by Congress under the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 *et seq.* The USOC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

As the courts below recognized, this case involves claims that "push the margins of federal disability discrimination laws." Pet. App. 22a; *see id.* 14a-15a.[1] Based on a novel reading of the Rehabilitation Act's "program or activity" definition, petitioners suggest that entities receiving federal funds must not only provide equal access to all of their individual programs—the established rule the Tenth Circuit below applied—but must also ensure equality "in the

[1] For purposes of recusal, counsel for the USOC states that Hogan & Hartson LLP began representing the USOC in this matter in March 2003.

allocation of a benefit *between* two or more programs." Pet. 17 (emphasis in original). Under this rule, the United States Olympic Committee (USOC), which operates different programs designed to support different elite athletes who compete in different sports in different international athletic competitions, would nevertheless need to ensure that the benefits in all programs were " 'equitable' or in some sense 'proportionate' " or " 'allocate[ed] fairly.' " Pet. 9 & n.5 (brackets in original).

The Tenth Circuit faithfully applied this Court's precedents in rejecting that boundless interpretation of the Rehabilitation Act. More than 20 years ago, this Court unanimously held that "[t]he Act does not * * * guarantee the handicapped equal results." *Alexander* v. *Choate*, 469 U.S. 287, 302 (1985). In the years since *Choate* was decided, few courts have ever had occasion to consider the extraordinary rule urged in the petition. Those that have, have squarely rejected the proposition that the federal disability-discrimination statutes "require equivalent benefits in different programs." *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996); *accord Castellano* v. *City of New York*, 142 F.3d 58, 70 (2d Cir.), *cert. denied*, 525 U.S. 820 (1998).

None of the factors traditionally warranting plenary review is therefore present. There is no circuit split because the two decisions the petition points to both considered different statutes (the Americans with Disabilities Act in one case and Title IX in the other), and neither addressed the novel question presented by the petition. Nor is there a conflict with this Court's decisions because the two cases identified in the petition either expressly

confirm that there is no equality-across-all-programs rule, *Choate*, 469 U.S. at 302, or else were decided before Congress had added the "program or activity" definition on which the petition is based. *See Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984).

This case is also a poor vehicle for revisiting settled antidiscrimination-law precedents. The Tenth Circuit below never had occasion to consider the remedy that would be required were petitioners' rule adopted. Nor has any other court in the country. Thus, it would fall to this Court in the first instance to explain how institutions covered by the Rehabilitation Act (to say nothing of Title VI, Title IX, and the Age Discrimination Act) should determine if the benefits they provide to different programs are " 'equitable' or in some sense 'proportionate' " or " 'fairly allocated.' " Pet. 9 & n.5 There is, in short, no reason for this Court to grant plenary review. The petition should be denied.

COUNTERSTATEMENT

1. One of the USOC's many obligations under its congressional charter is to "obtain for the United States * * * the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games and Pan American Games." Ted Stevens Olympic and Amateur Sports Act (ASA), 36 U.S.C. § 220503(3). Needless to say, the USOC, like any entity, does not have an infinite pool of resources to draw upon to carry out this important mission. It must allocate its scarce resources to programs that will best promote the overall standing of the United States in these international competitions.

To honor Congress's mandate to attract "the most competent amateur representation" at each of the Games, the USOC has developed a number of different initiatives. As with any institution—be it a university, government, or private business—the USOC draws upon its expertise, needs, and budget when fashioning its specific programs. Those factors inevitably dictate the size and scope of each program; there is no one-size-fits-all approach.

2. The USOC follows this commonsense analysis when developing programs to promote the United States Olympic Team and the United States Paralympic Team. For example, one of the factors that the USOC considers in tailoring programs designed to attract "the most competent amateur representation" for these different teams is past success. U.S. Paralympic athletes have traditionally won *substantially* more medals than Olympic athletes. For example, only 7% of U.S. athletes received a medal at the 1998 Olympic Winter Games, while a full 68% of U.S. Paralympic athletes earned a medal at that year's Paralympic Winter Games. C.A. J.A. 241.[2] Four years later in Salt Lake City, just 16% of U.S. Olympic athletes won a medal at the Olympic Winter Games, compared to the 75% of U.S. Paralympic athletes who came home with a medal from the Paralympic Winter Games. *Id.*; *see also* Pet. App. 4a ("U.S. Paralympians have been very successful compared to their Olympic counterparts * * * .").

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[2] C.A. J.A. refers to the Joint Appendix filed below in the Tenth Circuit.

Based on these and a variety of other factors, the USOC has developed a number of unique programs designed to promote and attract the best athletes for each Team. With respect to the Paralympic Team, the USOC has emphasized grassroots programs aimed at developing interest and expertise in these sports from the ground up. That makes sense because, compared to most sports featured at the Olympic Games—such as track and field and basketball—the sports at the Paralympic Games—such as wheelchair racing and wheelchair basketball—have no established pipelines for developing athletic talent, such as youth, high school, and college athletic programs. Accordingly, the USOC has developed a network of Paralympic Sports Clubs, which are designed to cultivate Paralympic sport participation at the local level. Similarly, the USOC oversees veterans' sports activities, and offers direct support to athletes training for the Paralympic Team.[3]

3. With respect to the United States Olympic Team, there is no similar need to develop grassroots programs for already-established sports. Instead, the USOC principally supports the U.S. Olympic Team by providing significant funding to the National Governing Bodies—such as USA Swimming and USA Gymnastics—that oversee and train the

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[3] The direct benefits afforded Paralympic athletes today are different than they were in 2003 when this case was filed; today's top Paralympic athletes are eligible for health insurance, grants, tuition assistance, and medal-prize money. The USOC's various direct athlete support programs have evolved in response to the availability of resources and the needs of the Teams.

elite U.S. amateur athletes training for the Olympic Games.

This case though concerns another tool that the USOC uses to attract the best athletes for the U.S. Olympic Team: the Athlete Support Program. Under this program, the USOC provides several types of grants, tuition assistance, and health insurance to athletes who satisfy a single eligibility criterion: the applicant must be someone who is "eligible to represent the United States and who intend[s] to compete, if selected, in the next Olympic or Pan American Games." C.A. J.A. 110. The Athlete Support Program is offered on a completely nondiscriminatory basis. The USOC does not ask whether an applicant is disabled; all that matters is that the applicant is eligible to represent the United States at the Olympic Games. If so, the athlete qualifies for the benefits—regardless of whether he or she has a disability.

Needless to say, conditioning benefits on being able to compete on the U.S. Olympic Team will make it difficult for certain individuals with disabilities to qualify. But that is no different than a university scholarship reserved for those who play on the school's basketball team or the government's G.I. Bill reserved for those who are physically fit enough to enlist in the Armed Forces. So long as all individuals—whether they have a disability or not—are offered equal access to the programs, federal law recognizes no violation. *See infra* 12-19.

And disabled athletes are hardly strangers to the Olympic Games. *See* Jere Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. Times,

May 15, 2007, at A1. Marla Runyon, an elite athlete who is also legally blind, represented the United States in the 1500-meter race at the 2000 Olympic Games. Because she was a member of the U.S. Olympic Team, she was eligible to receive—and did in fact receive—benefits under the USOC's Athlete Support Program. C.A. J.A. 89, 133. Ms. Runyon's experience indeed refutes one of the principal canards repeated early and often in the petition: that Paralympic athletes are "barred" from the Athlete Support Program. Pet. 11. They are not barred; rather, only Olympic athletes qualify. As Ms. Runyon's case shows, that facially neutral eligibility criterion provides equal access to the Athlete Support Program for able-bodied and disabled athletes alike.

Many other individuals with disabilities have likewise represented the United States in the Olympic Games, including, among others: Jim Abbott, a starting pitcher for the 1988 U.S. Olympic Team, who was born without a right hand[4]; Greg Barton, "who was born with club feet * * * and walks on the balls of his feet," but who still won two gold medals in kayaking at the 1988 Olympic Games (the first American to win a gold in kayaking in 52 years)[5]; Jeff Float, a swimmer at the 1984 Olympic Games, who is deaf[6]; Dave Wharton, a swimmer at

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[4] *See* Dave Anderson, *Sports of the Times*, N.Y. Times, Mar. 9, 1989, at D27.

[5] William N. Wallace, *Barcelona Profile; 4th Time Around, and Still Paddling!*, N.Y. Times, July 12, 1992, at B3.

[6] *See* Brian Cazeneuve, *Catching Up with . . . Jeff Float, Olympic Swimmer*, Sports Illustrated, Apr. 7, 2003, at 14.

the 1988 Olympic Games, who is also deaf[7]; and George Eyser, a gymnast who had lost his left leg to a train accident but still won six medals at the 1906 Olympic Games, three of which were gold.[8] And that does not even count the many disabled athletes from other countries that have competed in the Olympic Games.[9] Nor does it count—because the USOC does not ask about disability—the hundreds of U.S. Olympic athletes who have likely had some less visible but still serious impairments, like reproductive-health disabilities. *Cf. Bragdon* v. *Abbott*, 524 U.S. 624, 639 (1998) (recognizing that impairments that substantially limit the "major life activity of reproduction" constitute disabilities).[10]

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[7] *See Swim Shorts*, Time, Sept. 19, 1988, *available at* http://www.time.com/time/magazine/article/0,9171,968469,00.html.

[8] *See* Longman, *supra*, at A1.

[9] These include Neroli Fairhall, a paraplegic who represented New Zealand in the 1984 Olympics as an archer, *see* Longman, *supra*, at A1; Terence Parkin, a deaf swimmer who won a silver medal for South Africa at the 2000 Olympic Games, *see id.*; Paolo Fantato, an archer who was confined to a wheelchair due to polio and who represented Italy in the 1996 Olympic Games, *see Wheelchair Archer Loses*, N.Y. Times, July 30, 1996, at B13; and Natalie du Toit, an amputee swimmer who will represent South Africa at the 2008 Olympic Games, *see Natalie du Toit: Defiant Amputee To Go the Distance*, Australian Broadcasting Corp., June 26, 2008, *available at* http://www.abc.net.au/news/stories/2008/06/21/ 2281671.htm.

[10] Eric Shanteau, a member of the 2008 U.S. Olympic Team, announced just several weeks ago, after he qualified for the Games, that he has testicular cancer. *See* Katie Thomas, *U.S. Swimmer Makes Tough Choice to Compete*, N.Y. Times, July 12, 2008, at D1. Despite his disability, Mr. Shanteau was—and remains—eligible for the Athlete Support Program.

4. Petitioners, all former or current members of the U.S. Paralympic Team, sued the USOC under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and Section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a). But, as the District Court later recognized, the claims they brought "push[ed] the margins of federal disability discrimination laws." Pet. App. 22a. That is because the plaintiffs were not alleging that the USOC denied them access to the Athlete Support Program "by reason" of a disability. And they conceded--as they did again on appeal to the Tenth Circuit—that they were "not asking for any modification to the physical or athletic eligibility requirements for any Olympic or Pan-American sport." Hollonbeck C.A.10 Br. 34. Instead, petitioners proposed an entirely novel theory of antidiscrimination liability: that the USOC must provide equal benefits across its different programs designed for different athletes competing in different international competitions.[11]

Petitioners offered a series of evolving arguments in support of that newly minted theory below. In the District Court, petitioners principally urged the court to read into the Rehabilitation Act a proportional funding requirement akin to that mandated by the Department of Education's Title IX regulations. The District Court roundly rejected the argument, declining "Plaintiff's request that [the court] graft a remedial scheme promulgated under a statute banning sex discrimination onto statutes prohibiting

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[11] The International Olympic Committee oversees and organizes the Olympic Games. An entirely separate entity, the International Paralympic Committee, is responsible for overseeing the Paralympic Games.

disability discrimination." Pet. App. 37a-38a. Focusing on the text and precedents of those disability-discrimination statutes, the District Court concluded that "it is irrelevant that the USOC chooses to provide Olympic [Team benefits] only to Olympic athletes as long as the gateway to that program operates in a nondiscriminatory manner." Pet. App. 70a. Because the gateway to the Athlete Support Program indeed operates in a nondiscriminatory manner—*any* athlete, disabled or not, who is eligible to compete on the U.S. Olympic Team is eligible for the benefits—the District Court ruled in the USOC's favor. *Id.*

The Tenth Circuit affirmed. In doing so, it first rejected petitioners' argument that the Rehabilitation Act's definition of "program or activity" creates "a parity requirement across an institution's individual programs." Pet. App. 13a. The court recognized that the "program or activity" definition simply "expand[s] the application of * * * the Rehabilitation Act * * * to an entire institution if any part of the institution receives federal funds." Pet. App. 8a-9a n.1. Because, under the parties' stipulated facts, "[t]here is no dispute that the Rehabilitation Act applies to all of the USOC's programs," the Tenth Circuit found petitioners' parity argument based on the "program or activity" definition "inapposite." *Id.*[12]

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[12] The Tenth Circuit did not, as petitioners represent, find that "[S]ection 504 simply did not apply" to the USOC in this case. Pet. 13. It was petitioners' proposed argument under the Act's "program or activity" definition that did not apply. Pet. App. 8a-9a n.1.

Nor did the Tenth Circuit find fault in limiting the Athlete Support Program to just those athletes eligible to represent the United States in the Olympic Games. The court observed that the "Olympic athlete" designation "clearly does not contain an explicit requirement of not being disabled." Pet. App. 12a. Accordingly, because that eligibility criterion is facially neutral and is not "'directed at an effect or manifestation of a handicap,'" the Tenth Circuit ruled that the USOC does not violate Section 504 in administering the Athlete Support Program. Pet. App. 14a. Ultimately, the Tenth Circuit—like the District Court—concluded that, should petitioners wish to pursue their claim, they "should seek a remedy with the legislative or executive branches, not the courts." Pet. App. 14a-15a; *see also* Pet. App. 70a.

Petitioners sought rehearing en banc, alleging eight distinct claims of legal error. The last issue raised in their petition for rehearing—appearing on page 12 of their 13-page brief—was the novel "program or activity" question they now raise as the sole question in their petition for certiorari. The Tenth Circuit denied rehearing en banc, with six judges voting in favor of rehearing. Pet. App. 72a. None of those six judges, however, wrote separately to explain why they would have reheard the case or which (if any) of the eight points raised in the petition for rehearing they thought the panel got wrong.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF SETTLED LEGAL STANDARDS TO THE UNIQUE FACTS OF THIS CASE.

1. Section 504(a) of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, * * * be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). As this Court has emphasized, the "central purpose" of this nondiscrimination mandate "is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals." *Traynor* v. *Turnage*, 485 U.S. 535, 549 (1988) (quoting *Choate*, 469 U.S. at 304). That concern for evenhandedness dictates the proper inquiry under Section 504: What matters is whether there is an equal "*opportunity* for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Choate*, 469 U.S. at 302 (emphasis added). An entity thus honors the Act's nondiscrimination mandate so long as disabled and able-bodied individuals alike enjoy equal access to each of the entity's various programs. *See id.*

The USOC offers precisely that. In deciding who qualifies for the Athlete Support Program, the USOC employs a facially neutral restriction: "athletes who are eligible to represent the United States and who intend to compete, if selected, in the next Olympic or Pan American Games." C.A. J.A. 110. That lone criterion—whether the applicant is eligible to

represent the United States at the Olympic Games—"does not distinguish between" individuals "on the basis of any test, judgment, or trait" that has anything to do with disability. *Choate*, 469 U.S. at 302. All that matters is that the athlete—disabled or otherwise—is eligible to compete in the next Olympic Games.

2. Petitioners do not dispute that the USOC is entitled to fashion a specific benefits package aimed at attracting the highest caliber Olympic athletes (just as a university offers basketball scholarships to attract the best basketball players). Nor do petitioners dispute that the criterion the USOC uses—eligibility for the U.S. Olympic Team—is a facially neutral classification (just as restricting a basketball scholarship to those on the basketball team draws no distinction based on disability).

Instead, petitioners ask this Court to grant certiorari to consider a novel rule that few courts have considered and none have endorsed: An entity must ensure that money and resources are "*allocated fairly*" among its many different programs. Pet. 9 n.5 (brackets deleted, emphasis added); *see also id.* at i, 16, 17, 18. Without citing a single decision from this Court or any court of appeals, petitioners insist that Section 504 should not only "forbid * * * discrimination *within* a particular recipient-created program," but should also "apply to discrimination by a recipient in the allocation of a benefit *between* two or more programs." Pet. 17 (emphases in original). Under petitioners' new rule, the USOC would thus have to ensure that "the level of benefits for the Paralympic athletes ha[s] to be 'equitable' or in some

sense 'proportionate'" to those offered in the separate Athlete Support Program. Pet. 9

But as the Tenth Circuit recognized, Section 504 requires no such thing. Pet. App. 8a-11a. More than two decades ago in *Choate*, this Court emphasized that "[t]he Act does not * * * guarantee the handicapped equal results." 469 U.S. at 302. Here, so long as the USOC offers equal access to its Athlete Support Program to able-bodied and disabled athletes alike, it does not matter whether a different program designed for different athletes competing in different sports at different competitions receives "equitable," "proportionate," or some other indeterminate quantum of benefits.

3. Petitioners nevertheless insist that their all-programs-must-be-funded-equally rule is dictated by the plain language of Section 504. The key textual phrase that anchors their entire theory is the Act's "definition of 'program' under Section 504." Pet. 16. According to petitioners, this definition "is of considerable importance because it determines the nature of the anti-discrimination prohibition." *Id.*

Not so. That definition provides, in relevant part, that "the term 'program or activity' means all of the operations of * * * an entire corporation * * * if assistance is extended to such corporation * * * as a whole." 29 U.S.C. § 794(b). By its plain terms, the clause merely speaks to the breadth of an entity's compliance obligation; it makes entire institutions subject to the Act even if just a portion of the institution receives federal funds. What it most certainly does not do is modify the substantive standards for evaluating whether an entity receiving

financial assistance has discriminated "solely by reason of * * * disability." 29 U.S.C. § 794(a).

Indeed, until 1987, the Rehabilitation Act, Title VI, Title IX, and the Age Discrimination Act did not even contain a "program" definition. Rather, Congress added the definition to those statutes through the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. In adopting that definition, Congress had no intention of modifying the substantive "nature of the anti-discrimination prohibition." Pet. 16. As this Court has observed on multiple occasions, the only reason Congress added the "program" definition was "to correct what it considered to be an unacceptable decision on [this Court's] part in *Grove City College* v. *Bell*, 465 U.S. 555 (1984)," which had concluded that Title IX covered only the specific program receiving federal funding. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992); *see National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 466 n.4 (1999). Thus, all the "program" definition did was to clarify that "if any part of [an entity] receive[s] federal assistance, all [its] operations would be subject to" the Rehabilitation Act. *Smith*, 525 U.S. at 466.

The petition notably fails to cite *Franklin*, *Smith*, or any other decision from this Court construing the "program" definition. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). And for good reason. This Court has rejected all previous attempts to make more of the "program" definition than its language and purpose could bear. For example, in *Sandoval*, the plaintiffs argued that the "program" definition effectively created a private right of action to enforce the disparate-impact

regulations under Title VI. But this Court squarely rejected that argument, emphasizing the narrow purpose of the definition and finding that "it is impossible to understand what [the "program" definition] has to do with implied rights of action." *Sandoval*, 532 U.S. at 292. Similarly, in *Franklin*, this Court held that the "program" definition had no substantive impact on the Title IX private right of action this Court recognized in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). As the Court explained, Congress adopted the definition "[w]ithout in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act." 503 U.S. at 73.

4. Because this Court unanimously held more than 20 years ago that the Rehabilitation Act "does not * * * guarantee the handicapped equal results," but instead guarantees equal "opportunity * * * to participate in and benefit" from a federal recipient's various programs, *Choate*, 469 U.S. at 302, few parties have ever advocated the novel rule urged by petitioners here. But the two circuits that have considered the rule have roundly rejected it, just as the Tenth Circuit did below.

In *Does 1-5* v. *Chandler*, 83 F.3d 1150 (9th Cir. 1996), the Ninth Circuit considered—and rejected—a claim that the federal disability-discrimination statutes "require equivalent benefits in different programs." *Id.* at 1155. There, the State of Hawaii had created two different welfare programs with two different levels of benefits: one designed for individuals with dependent children—which had no durational limit—and another for individuals with

disabilities—whose benefits terminated after just one year. *Id.* at 1151-52. The plaintiffs argued that Hawaii discriminated against the disabled by imposing time limits on a program designed to assist the disabled while offering infinite benefits for the program aimed at helping individuals with dependent children. The Ninth Circuit disagreed, ruling that the two programs established by Hawaii did not "den[y] benefits based on disability." *Chandler*, 83 F.3d at 1155. That was because the able-bodied and the disabled alike had an equal opportunity to obtain the better benefits package, since "disabled people with children were not excluded from full participation in the program." *Id.*

The Second Circuit, like the Ninth Circuit in *Chandler* and the Tenth Circuit below, has likewise rejected the rule that an entity must provide equal benefits to different programs designed to promote different goals. In *Castellano* v. *City of New York*, the city had created two separate retirement funds for police officers and fire fighters: one for "for service" retirees—meaning they worked a full 20 years on the job—and another fund for those who had retired earlier "with a disability." 142 F.3d at 63-64. Those who retired "for service" qualified for a supplemental benefits package; those who retired "with a disability" did not. *Id.*

The Second Circuit held that these different benefits packages did not violate Section 504 of the Rehabilitation Act or the ADA. In reaching that result, the court recognized that the disability-discrimination statues "require[ ] only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have

given an equivalent amount of service." *Id.* at 70. The city did not violate that requirement because the supplemental retirement benefits were "available equally to persons with and without disabilities who retire after twenty years of service." *Id.* As the court explained, the Rehabilitation Act does not require that different programs "provide the same level of benefits, because they are two separate benefits which serve different purposes." *Id.* And the Ninth Circuit just recently reached the same result in a closely analogous case. *See Brown* v. *City of Los Angeles*, 521 F.3d 1238, 1242 (9th Cir. 2008) ("The two programs need not provide identical benefits.").

Notably, the Second Circuit in *Castellano* relied heavily on guidance offered by the Equal Employment Opportunity Commission (EEOC). That guidance roundly refutes the novel rule petitioners have advocated. One of the hypotheticals that the EEOC's guidance poses is virtually indistinguishable from the issue in this case: "If an employer provides a disability retirement plan, is it permissible under the ADA for that plan to provide lower levels of benefits than the same employer's service retirement plan?" EEOC Notice No. 915.002, Questions & Answers (May 11, 1995), *available at* http://www.eeoc.gov/policy/docs/qadsre.html. The Commission categorically states that "[n]one of these [arrangements] would violate the ADA *under any theory of discrimination*." *Id.* (emphasis added). That is because "none of the plans make distinctions based on whether or not an individual is covered under the ADA. Thus, * * * the service retirement plan is available to all employees who have attained 20 or more years of service, without regard to the presence or absence of a disability." *Id.* As with the

Rehabilitation Act, "[t]he ADA does not require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits which serve different purposes." *Id.*

That, of course, is exactly what the USOC does. Just like a "for service" retirement plan, the USOC's Athlete Support Program is available to all athletes who are eligible to represent the United States at the Olympic Games "without regard to the presence or absence of a disability." *Id.* The fact that the USOC provides a different set of benefits for a different group of athletes who are training for a different series of competitions has no relevance when assessing whether *access* to the Athlete Support Program operates without regard to disability. As in *Castellano*, "they are two separate benefits which serve different purposes." 142 F.3d at 70.

Because the Tenth Circuit correctly applied settled precedents to the facts of this case, this Court should deny the petition.

II. THE DECISION BELOW CONFLICTS WITH NONE OF THIS COURT'S DECISIONS OR WITH ANY DECISION FROM THE COURTS OF APPEALS.

Not surprisingly given the settled state of the law and the unusual facts of this case, petitioners are unable to identify a single conflict of authority warranting this Court's review. Petitioners allege a conflict with only two other circuits, *see* Pet. 28-33, but those alleged conflicts fail to materialize.

1a. *Rodde* v. *Bonta*, 357 F.3d 988 (9th Cir. 2004), presents no conflict for a variety of reasons. To begin

with, *Rodde* arose under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165, not Section 504 of the Rehabilitation Act. *See id.* at 993. That is important because Title II of the ADA does not contain the "program" definition that the petition insists "is of considerable importance" in "determine[ing] the nature of the anti-discrimination prohibition" of Section 504. Pet. 16. For that reason alone, *Rodde* neither forges a conflict with the decision below nor supports petitioners' novel rule of decision.

Rodde, in fact, undermines petitioners' principal argument that the "program" definition "determines the nature of the antidiscrimination mandate." Pet. 16. That is because Congress, the courts, and even petitioners below have recognized that "Title II [of the ADA] 'essentially simply extends the anti-discrimination prohibition embodied in Section 504 * * * to all action of state and local governments." Hollonbeck C.A.10 Br. 25 n.5 (quoting *Chaffin* v. *Kansas State Fair Bd.*, 348 F.3d 850, 859 (10th Cir. 2003) (quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990))). But if the ADA does replicate the Rehabilitation Act's "anti-discrimination prohibition"—and we agree with petitioners that it does—then the Rehabilitation Act's substantive antidiscrimination prohibition must necessarily be tied to something other than the "program" definition. Otherwise, the ADA—which lacks such a provision—would not mirror the Rehabilitation Act in substance.

There are further problems still with *Rodde*. By relying so extensively on an ADA case, the petition raises a number of troubling questions of first impression that strongly counsel against certiorari.

For example, would petitioners' novel reading of "program or activity"—requiring equality "in the allocation of a benefit *between* two or more programs," Pet. 17 (emphasis in original)—extend to Title II of the ADA? And what about Title III, which applies the ADA's non-discrimination mandate to private businesses and entities that operate "places of public accommodation"? *See* 42 U.S.C. § 12182(a); *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128 (2005) ("Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations."). After all, courts have "consider[ed] cases dealing with each Act as applicable and interchangeable." *Mershon* v. *St. Louis Univ.*, 442 F.3d 1069, 1076 n.4 (8th Cir. 2006) (quotation omitted). Yet it would radically transform Title III's nondiscrimination mandate if private businesses suddenly had to ensure not just equal access to all of their programs and operations but also that all "benefits be allocated fairly" (Pet. 9 n.5) among those programs and operations.[13]

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[13] Take, for example, the Boston Marathon, which would be covered by Title III of the ADA. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 677 (2001). The Marathon's organizers offer $15,000 in prize money to the winner of the wheelchair marathon, but $100,000 to the winner of the traditional marathon. *See* http://www.boston.com/marathon/runners/prize.htm. Under petitioners' theory, the organizers would have to provide " 'equitable or in some sense 'proportionate' " (Pet. 9) prize money for those two different races. By the same token, no one questions the disparity in prize money awarded to winners on the PGA Tour and winners on the Champions Tour (reserved exclusively for golfers over 50, formerly known as the Senior Tour). But under petitioners' theory, if the PGA received federal funds of some sort, it would violate the Age Discrimination Act unless it offered lock-step prize pools for the two different tours.

Because no other circuit has ever contemplated such an expansive rule—let alone adopted it—this Court would need to resolve these thorny questions in the first instance without the guidance and experience of the regional courts of appeals. For that reason alone, the Court should deny certiorari and allow the issue—to the extent it ever comes up again—to percolate in the lower courts.

Finally, *Rodde* presents no conflict because the decision did not even address the question presented in the petition—whether two separate programs must offer "equitable" or "proportionate" benefits. Rather, the question in *Rodde* implicated traditional equality of access concerns—whether disabled individuals were denied equal access to a single program. There, the County of Los Angeles offered medical services on a county-wide basis to all residents who qualified for Medicaid. *See* 357 F.3d at 990. In order to provide disabled residents with "meaningful access" to that general program—as the Rehabilitation Act's regulations and case law require[14]—the County consolidated in one hospital much of the equipment and personnel needed to effectively treat certain disabled individuals. *See id.* at 990-991. When the County later sought to close that hospital, the question was whether "the closure * * * would deny certain disabled individuals meaningful access to government-provided services because of their unique needs." *Id.* at 998. The

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[14] *See* 28 C.F.R. § 35.130(b)(1)(iv); 45 C.F.R. § 84.4(b)(1)(iv); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979) ("[A] refusal to modify an existing program [to accommodate the needs of the disabled] might become unreasonable and discriminatory.").

Ninth Circuit held that it would. But the court reached that result through a straightforward application of settled ADA precedent, finding that the plaintiffs would be effectively denied access to a single program open to everyone else. Nowhere did the court of appeals suggest that it was evaluating two separate programs—much less mandate that all of the county's programs receive across-the-board equal funding.

b. The only other decision that petitioners contend conflicts with the ruling below is *Klinger* v. *Department of Corrections*, 107 F.3d 609 (8th Cir. 1997). But it likewise presents no actual conflict. Pet. 30-32. To begin with, *Klinger* was brought under Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681(a), not Section 504 of the Rehabilitation Act. There, prisoners at an all-female prison sued Nebraska, arguing that the men at one particular all-male prison received better educational benefits. The Eighth Circuit found, based on the facts of that case, that the proper "program" to evaluate in considering whether the plaintiffs were denied equal educational opportunities was not any specific male prison but instead the "Nebraska prison system as a whole." *Id.* at 615.

In reaching this result, the Eighth Circuit emphasized the "unique context" of sex-segregation in a prison system. *Id.* at 616. It observed, for example, that "[i]t is beyond controversy that male and female prisoners may lawfully be segregated into separate institutions within a prison system." *Id.* at 615. It therefore concluded that, "[w]hen considering single-sex prisons, the only logical and workable application of the definition of 'program or activity'

under Title IX requires comparison of educational opportunities for female and male prisoners within the entire system of" state prisons. *Id.* at 616. Other circuits have likewise recognized the *sui generis* nature of applying Title IX to prisons. *See, e.g.*, *Jeldness* v. *Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) ("Prisons are different from other institutions to which Title IX applies. Security is an important concern. And sex segregation is the accepted norm.").

Even outside the prison context, Title IX has limited application to the question here. As the Tenth Circuit below correctly recognized, courts "cannot modify the Rehabilitation Act to reach a result in [petitioners'] favor absent statutory or regulatory authority to import, wholesale, Title IX regulations and precedent into § 504." Pet. App. 14a. Furthermore, although petitioners insist that "this Court has repeatedly noted [that] section 504 was based on the similarly worded provisions of Title VI," and shares the same "program or activity" language as "Title IX of the Education Act Amendments of 1972," Pet. 21-22, they neglect to mention this Court's key caveat: that "too facile an assimilation of Title VI law to § 504 must be resisted." *Choate*, 469 U.S. at 291 n.7.

Despite that caution, petitioners spill much ink discussing the role that Title IX plays in collegiate athletics—and the role petitioners want it to play in this case. *See* Pet. 23-25, 31-33. But the rules mandating "substantially proportionate" athletic opportunities for male and female students at U.S. colleges and universities derive from detailed *regulations* issued by the Department of Education.

See 36 C.F.R. pt. 106; Policy Interpretation—Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). What is more, those regulations do not even require, as petitioners would, that the "level of benefits * * * be 'equitable' or in some sense 'proportionate.'" Pet. 9. To the contrary, the Department of Education's regulations provide that "[u]nequal aggregate expenditures for numbers of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will *not* constitute noncompliance." 34 C.F.R. § 106.41(c) (emphasis added). And not to put too fine a point on matters, but the Departments of Justice and Health and Human Services—the two agencies charged with administering the Rehabilitation Act and the ADA—have *never* promulgated any regulations that even hint at a Title IX-like framework. *Klinger*, in short, creates no conflict with the decision below.

2a. Petitioners point to two vague "conflicts" between the decision below and this Court's decisions. First, they suggest that the decision below conflicts with *Choate*'s observation that the "benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." Pet. 24-25 (quoting *Choate*, 469 U.S. at 301). Never mind that this aspect of *Choate* has nothing whatsoever to do with the question presented by the petition—which deals exclusively with the meaning and scope of the "program or activity" language of Section 504. Pet. i. But even if the petition had presented a second question that fairly implicated this portion of *Choate*, there would be nothing certworthy about it. The Tenth Circuit,

after all, did not reject, modify, or otherwise disagree with this well-settled principle. At best, the petition merely complains about "the misapplication of a properly stated rule of law." S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the error consists of * * * the misapplication of a properly stated rule of law.").

In any event, the Tenth Circuit did not misapply *Choate*. The benefit here—the USOC's Athlete Support Program—is not "defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Choate*, 469 U.S. at 301. There is but one criterion for gaining access to that benefit: the individual must be eligible to represent the United States at the Olympic Games. There is nothing discriminatory about that; the eligibility criterion is "neutral on its face, [and] does not distinguish * * * on the basis of any test, judgment, or trait" that is rooted in disability. *Choate*, 469 U.S. at 302. All athletes—regardless of whether they have a disability or not—can qualify for the benefit. To be sure, many individuals with mobility impairments may have difficulty qualifying for the Olympic Team, given the nature of the sports featured in the Olympic Games. But the same is true of the federal G.I. Bill, which is reserved for those who enlist in the Armed Forces—where individuals with mobility impairments may have difficulty qualifying. Likewise, students with mobility impairments may find it difficult or even impossible to qualify for a university scholarship reserved for members of the basketball or football teams. Yet the difficulty that disabled individuals may face in qualifying for these programs does not transform a facially neutral

eligibility criterion into an invidious exclusion. *See Choate*, 469 U.S. at 302.[15]

b. It is difficult to understand why petitioners think the decision below conflicts with *Grove City College* v. *Bell*, 465 U.S. 555 (1984). *See* Pet. 26. As we explained, *supra* 15, when that case was decided, the Rehabilitation Act contained no definition for "program or activity." In *Grove City*, this Court interpreted the "program or activity" language narrowly, holding that only the specific department receiving federal financial assistance—in that case, the college's financial aid office—was required to comply with Title IX (and, by extension, the Rehabilitation Act, the Age Discrimination Act of 1975, and Title VI). 465 U.S. at 573-574. Congress subsequently abrogated *Grove*, and this Court has consistently recognized that the "program" definition did not "in any way alte[r] the existing rights of action and the corresponding remedies permissible under the Rehabilitation Act." *Franklin*, 503 U.S. at 73; *accord Sandoval*, 532 U.S. at 292. Nothing in the Tenth Circuit's decision remotely conflicts with *Grove City*.

4. Unable to identify any actual conflict with the decisions of this Court or any circuit court,

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[15] Under petitioners' theory, the USOC would also violate the Act by spending more money on swimming (which tends to disqualify more mobility-impaired athletes) than on archery (which more mobility-impaired athletes can perform). Not only would such outcomes turn the disability-discrimination legislation on its head; it also would conflict with the rule adopted by the EEOC and put to practice by the Second and Ninth Circuits in *Castellano*, *Chandler*, and *Brown*.

petitioners spend much of their time hypothesizing potential future conflicts that may—or may not—ever come to pass. *See, e.g.*, Pet. 22 ("The Tenth Circuit decision opens the door to discrimination on the basis of race, color, national origin and gender * * *."); *id.* 23 ("The Tenth Circuit decision would have a similar impact on the effectiveness of Title IX."). Backed by not a single citation, petitioners' parade of horribles turns out to be not nearly as frightening as they imagine. Indeed, there are decisions from this Court—which the petition neglects to cite—that have found nothing illegal or unconstitutional about some of the scenarios petitioners conjure.

Take, for example, the hypothetical about "higher education systems in the South [that] often include one or more colleges or universities which are overwhelmingly white and others which are predominately non-white." Pet. 22. Petitioners point out that "[u]nder the Tenth Circuit's interpretation of 'program,' the largely white University of Mississippi would constitute a different program than the overwhelmingly black Jackson State University." *Id.* 22-23. They find this troubling because, if Mississippi officials elected to pour more resources into the University of Mississippi than into Jackson State University, "the Tenth Circuit decision would immunize that decision from examination under Title VI." *Id.* 23.

But in *United States* v. *Fordice*, 505 U.S. 717 (1992), this Court concluded—on facts that are virtually indistinguishable from petitioners' Mississippi hypothetical—that universities are indeed free to do exactly that. In *Fordice*, this Court

considered whether Mississippi had met its obligation under *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954), to dismantle its prior dual system of public universities. Under that system, historically white institutions (HWI's) like the University of Mississippi "received the most funds, initiated the most advanced and specialized programs, and developed the widest range of curricular functions," while historically black institutions (HBI's) like Jackson State "were more limited in their assigned academic missions." *Fordice*, 505 U.S. at 739. Although the Court ultimately remanded for further findings, it rejected any claim that the Equal Protection Clause forbids a State from assigning different educational missions to its different universities and, in turn, funding them differently according to those prerogatives where there is no discriminatory animus: "We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remain predominately black or white." *Id.* at 741.[16] And directly refuting the hypothetical that petitioners set forth in the petition, Justice Scalia separately noted that: "Among petitioners' contentions is the claim that the Constitution requires Mississippi to correct

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[16] Although *Fordice* was decided under the Equal Protection Clause, not Title VI, this Court has held that the two are co-extensive: "Title VI proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003) (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

funding disparities between its HBI's and HWI's. The Court rejects that—as I think it should—since it is students and not colleges that are guaranteed equal protection of the laws." *Id.* at 759 (Scalia, J., concurring in part and dissenting in part).[17]

Petitioners are therefore exactly wrong in suggesting that "[t]he Tenth Circuit decision opens the door" to additional forms of discrimination. Pet. 22. The decision below instead faithfully applies this Court's precedents, which make clear that individuals must receive equal opportunities to vie for the same programmatic benefits, not that different programs must receive equal funding. Because petitioners are unable to establish a conflict with even a hypothetical—let alone an actual decision—the petition should be denied.

III. THIS CASE IS A POOR VEHICLE FOR REVISITING SETTLED ANTIDISCRIMINATION PRECEDENTS.

The question presented in this case broadly implicates the meaning of Section 504's "program or activity" language. As the petitioners themselves point out, that same statutory formulation appears in dozens of other federal antidiscrimination statutes. Pet. 15. But there are three reasons why this case presents an exceptionally poor vehicle for considering a new rule of construction that, if adopted, would radically reshape the

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[17] This Court in *Fordice* remanded with instructions to identify the most appropriate remedy for Mississippi's entrenched history of *de jure* segregation, including possible modifications to the State's public university program. Needless to say, petitioners' complaint against the USOC did not, nor could it, allege any history of *de jure* segregation.

nondiscrimination mandate of roughly 29 federal laws. *See* Pet. App. 74a-76a.

First, the Court should deny the petition because it is entirely unclear what remedy petitioners would be entitled to if Section 504 were construed to regulate "the allocation of a benefit *between* two or more programs." Pet. 17 (emphasis in original). No court in the country—including the court below—has ever examined how federal courts would audit the budgets of corporations, universities, and governments to ensure that they had distributed benefits "fairly." Even petitioners have demonstrated some uncertainty over the proper remedy. The petition itself acknowledges that, at various times "[i]n the litigation in the courts below," petitioners advocated that "the level of benefits for Paralympic athletes had to be 'equitable' or in some sense 'proportionate.' " *Id.* 9. Recognizing the fatal indeterminacy of these standards, a footnote in the petition insists that "plaintiffs were asking only that the USOC benefits be 'allocat[ed] fairly.' " *Id.* 9 n.5 (alteration in original).

But "equitable," "proportionate," and "allocated fairly" are protean terms that—standing alone—are meaningless. This Court should not pass upon the novel question presented in the petition before the regional courts of appeals have had an opportunity to consider the impact of the petitioners' rule. Depending on how lower courts define "equitable" or "proportionate" or "allocated fairly," universities, non-profit organizations, state and federal governments, and many other businesses and institutions subject to the Rehabilitation Act might face colossal liabilities and need to fundamentally

restructure entire departments, programs, and missions. By allowing this issue to percolate in the lower courts—and by waiting until at least one circuit actually adopts petitioners' rule—this Court will be able to reach a sounder decision in the event it wishes to review the question in the future.

The second reason why this case would be a poor candidate for certiorari is because it turns on a set of highly idiosyncratic facts. Petitioners throughout this litigation have emphasized the unique and special role that Congress assigned the USOC under an entirely different statute: the ASA, 36 U.S.C. § 220501 *et seq.* *See, e.g.*, Hollonbeck C.A.10 Br. 11-13, 35-36; J.A. CA.10 247. They argued that the USOC had an obligation to ensure some measure of parity between the Olympic and Paralympic Teams because, among other reasons, "the ASA * * * gives [the USOC] responsibility for all 'matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games.'" Hollonbeck C.A.10 Br. 11 (quoting 36 U.S.C. § 220503(3)(A)). Underscoring the unique role that the ASA has always played in their discrimination claims, petitioners insisted below that the term "amateur athlete," which is defined in the ASA, "is *central* to understanding what the USOC does and who it serves." *Id.* (emphasis added). Petitioners likewise quoted early and often in their briefs below a snippet of the ASA's legislative history that "described the Paralympics as 'the Olympics for disabled amateur athletes.'" *Id.* 10 (quoting S. Rep. No. 105-325, at 2 (1998)); *accord* C.A. J.A. 247. Even Petitioners' own amici recognize that this case arises from the unique role the USOC

plays in organizing the Olympic and Paralympic Teams. National Fed. Blind Br. 12-14.

Because petitioners' claims of discrimination are so inextricably entwined with the peculiar role that Congress assigned the USOC in the ASA, this case is a poor vehicle for re-examining statutory language that could broadly affect the scope of Title VI, Title IX, and the Age Discrimination Act. Pet. 15. Thus, even if the Court were inclined to revisit the meaning of the "program or activity" clause, it should await another case in which the theory of discrimination does not hinge so critically on other highly specialized federal statutes.

Finally, petitioners' ultimate concern with how the USOC allocates its budget is better addressed by Congress exercising its legislative oversight, rather than by this Court re-interpreting settled Rehabilitation Act precedents. Under Section 220511(a)(4) of the ASA, the USOC must submit a "detailed report" every four years to both Houses of Congress that addresses, among other items, "data concerning the participation of * * * disabled individuals * * * in the amateur athletic activities and administration of the corporation," and a "description of the steps taken to encourage the participation of * * * disabled individuals * * * in amateur athletic activities." 36 U.S.C. § 220511(a)(3), (4). Given that Congress carefully monitors and assesses the opportunities for disabled individuals in amateur athletics, this Court should not exercise its discretionary jurisdiction to address petitioners' highly fact-specific concerns about direct Paralympic athlete funding.

* * *

In view of the unusual circumstances precipitating this action, we doubt that the question presented will recur soon or often. But if it does, this Court would almost certainly benefit from further deliberation by the lower courts and the joining of issues that comes only with the development of a true conflict.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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